EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(2)

Nos. 94-1528 and 94-1564

JUN 7

In the Supreme Court of the United States

OCTOBER TERM, 1994

HORACE SOLOMON, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS AND LOAN ASSOCIATION, F.A.

SUSAN SOLOMON PATTULLO, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS AND LOAN ASSOCIATION, F.A.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELLEN B. KULKA
General Counsel

ANDREW E. TOMBACK
Deputy General Counsel

KEVYN D. ORR
Assistant General Counsel
Resolution Trust Corporation
Washington, D.C. 20006

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Resolution Trust Corporation, in its capacity as receiver of a failed depository institution, has the power under 12 U.S.C. 1821(e) (Supp. V 1993) to repudiate leases that are subject to state and local rent-control regulations, and to terminate occupancy by tenants thereunder.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	10
Conclusion	19

TABLE OF AUTHORITIES

Cases:

American Airlines, Inc. v. *Wolens*, 115 S. Ct. 817 (1995)	13
Bateman v. *FDIC*, 970 F.2d 924 (1st Cir. 1992)	14
BFP v. *RTC*, 114 S. Ct. 1757 (1994)	12
Cipollone v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992)	11, 13
Dawson v. *Higgins*, 610 N.Y.S.2d 200 (App. Div.), appeal dismissed, 616 N.Y.S.2d 476 (N.Y. 1994), cert. denied, 115 S. Ct. 724 (1995)	17
Dickerson v. *New Banner Institute, Inc.*, 460 U.S. 103 (1983)	11
District of Columbia v. *Greater Washington Board of Trade*, 113 S. Ct. 580 (1992)	11
Duell v. *Condon*, 622 N.Y.S.2d 891 (N.Y. 1995)	18
General Motors Corp. v. *Romein*, 503 U.S. 181 (1992)	13
Manocherian v. *Lenox Hill Hosp.*, 618 N.Y.S.2d 857 (N.Y. 1994), cert. denied, Nos. 94-1555 and 94-1560 (May 15, 1995)	17
O'Melveny & Myers v. *FDIC*, 114 S. Ct. 2048 (1994)	7, 10, 12, 18
Patterson v. *FDIC*, 918 F.2d 540 (5th Cir. 1990)	14
Pattullo v. *RTC*, 115 S. Ct. 44 (1994)	7
RFC v. *Beaver County*, 328 U.S. 204 (1946)	11-12
Rent Stabilization Ass'n v. *Higgins*, 608 N.Y.S.2d 930 (N.Y. 1993), cert. denied, 114 S. Ct. 2693 (1994)	17

Cases—Continued: Page

Saravia v. *1736 18th St., N.W., Limited Partnership*, 844 F.2d 823 (D.C. Cir. 1988) 15
Seawall Associates v. *City of New York*, 544 N.Y.S.2d 542 (N.Y.), cert. denied, 493 U.S. 976 (1989) 8, 17
Solomon v. *RTC*, 115 S. Ct. 43 (1994) 7
United States v. *Idaho*, 113 S. Ct. 1893 (1993) 11
United States v. *National Bank of Commerce*, 472 U.S. 713 (1985) 11

Constitution and statutes:

U.S. Const. Art. I, § 10, Cl. 1 (Contract Clause) 13, 14
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 2
12 U.S.C. 1441a(b) (Supp. V 1993) 2
12 U.S.C. 1441a(b)(4)(A) (Supp. V 1993) 2
12 U.S.C. 1821(c)(1) (Supp. V 1993) 2
12 U.S.C. 1821(e) (Supp. V 1993) ...2, 3, 5, 6, 7, 10, 16
12 U.S.C. 1821(e)(1) (Supp. V 1993) 2, 3, 5, 7, 8, 9, 11, 14
12 U.S.C. 1821(e)(1)(B) (Supp. V 1993) 9
12 U.S.C. 1821(e)(3) (Supp. V 1993) 11
12 U.S.C. 1821(e)(5) (Supp. V 1993) 3, 6, 15, 16, 19
12 U.S.C. 1821(e)(5)(A)(ii) (Supp. V 1993) 9
12 U.S.C. 1823(e) (Supp. V 1993) 14
11 U.S.C. 365(a) 15
11 U.S.C. 365(h)(1) 6
26 U.S.C. 6331(a) 11
43 U.S.C. 666 11

Miscellaneous:

59 Fed. Reg. 5450 (1994) 3

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1528

HORACE SOLOMON, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS AND LOAN ASSOCIATION, F.A.

No. 94-1564

SUSAN SOLOMON PATTULLO, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS AND LOAN ASSOCIATION, F.A.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (Pet. App. 1a-27a)[1] is reported at

---

[1] References are to the appendix to the petition in No. 94-1528.

45 F.3d 665. That court's original opinion (Pet. App. 29a-65a) is reported at 18 F.3d 111. The opinion of the district court (Pet. App. 66a-93a) is reported at 801 F. Supp. 1152.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1995. The petition for a writ of certiorari in No. 94-1528 was filed on March 15, 1995, and the petition in No. 94-1564 was filed on March 22, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress created the Resolution Trust Corporation (RTC) in part to receive and liquidate the assets of failed savings institutions. See generally 12 U.S.C. 1441a(b) (Supp. V 1993), enacted by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. Section 1441a(b)(4)(A) grants the RTC the "same powers and rights to carry out its duties with respect to [certain federally insured depository] institutions * * * as the Federal Deposit Insurance Corporation has under sections 1821, 1822, and 1823 of [Title 12]." Section 1821(c)(1) authorizes the RTC to accept appointments and act as the receiver for such an institution.

Section 1821(e) describes the powers of the receiver with respect to leases and other preexisting contracts of the institution. Section 1821(e)(1) provides that the receiver "may * * * repudiate any * * * lease * * * to which such institution is a party," if the receiver "determines" that "the performance of

[the lease] * * * [would] be burdensome," and if the receiver also "determines, in the * * * receiver's discretion, [that repudiation] will promote the orderly administration of the institution's affairs." Section 1821(e)(5) specifies the remedies available to a tenant if the RTC repudiates a lease under Section 1821(e)(1). If the tenant is not in default, the tenant has the option of either treating the lease as terminated by the repudiation, or remaining in possession for the balance of the term of the lease, in which case the tenant must continue to pay the rent due under the terms of the lease. Once the leasehold expires, the tenant may be required to quit the premises.

In February, 1991, the Board of Directors of the RTC adopted and issued a policy statement limiting the circumstances in which it would exercise its powers under Section 1821(e) to remove tenants from properties subject to state and local rent-control and rent-stabilization regulations. C.A. App. A55-A57; see Pet. App. 38a. Under that policy, "[i]t is clearly the intention of the Board of Directors to avoid displacing low and moderate income tenants from such units." C.A. App. A55. Accordingly, if "the RTC finds that units are leased by low or moderate income tenants, the RTC will not exercise its disaffirmance or repudiation powers with respect to those units." *Id.* at A56.[2] With respect to units not

---

[2] The statement defined a low- or moderate-income tenant as "a family or individual whose income does not exceed one hundred and fifteen percent (115%) of the median income in the area involved, as determined by the U.S. Secretary of Housing and Urban Development, with adjustments for family size." C.A. App. A56-A57. The relevant percentage has since been raised to 130%. See 59 Fed. Reg. 5450 (1994).

occupied by low- or moderate-income tenants, however, the statement concluded that "[t]he RTC, and ultimately the taxpayers, cannot be put in the position of continuing to underwrite rental of such units at a significant loss to the RTC." *Id.* at A55. Thus, the Board of Directors "determined that disaffirmance or repudiation of leases of these units * * * is required in these circumstances." *Id.* at A56.

2. This case involves the tenants of nine apartments in a luxury apartment building built before World War II and located at 444 E. 57th Street (near the corner of Sutton Place) in New York City. See C.A. App. A449 (¶ 3).[3] Each of the apartments is subject to provisions of state and local law that either control the rent payable under the apartment leases or specify the increases in rent that are permissible in any given year. In or about 1984, the owner of the apartments granted a security interest in the apartments to Nassau Federal Savings and Loan Association to secure a loan of $3.2 million. When the owner defaulted on the loan in 1987, Nassau Federal became the owner of the apartments. Nassau Federal failed in March, 1990, and the RTC was appointed receiver. After determining that it was losing almost $19,000 per month on the nine apartments, based on the difference between the rent collected and the required expenses of ownership (including taxes and common charges assessed by the cooperative board, but not including insurance, maintenance, and repair costs), the RTC as receiver notified the tenants that it was repudiating their tenan-

---

[3] An independent 1990 appraisal placed the unregulated market value of the nine apartments at issue here at $7,565,000. See C.A. App. A400 (¶ 4), A450 (¶ 6).

cies under Section 1821(e). See Pet. App. 32a-39a; C.A. App. A449-A450 (¶¶ 4-5).[4]

3. When the tenants and various state officials disputed the authority of the receiver to repudiate the tenancies, the receiver filed this action in the United States District Court for the Southern District of New York, seeking a declaration that it had the power to repudiate the tenancies in question. The district court granted summary judgment for petitioners, concluding that the RTC as receiver does not have the authority to repudiate the tenancies. Pet. App. 66a-93a. The court stated that applicable New York laws create "statutory tenancies" (*id.* at 75a), under which the tenants enjoy "occupancy rights that are independent of any lease they may have with their landlords" (*id.* at 80a). The court reasoned that the power granted in Section 1821(e)(1) does not authorize repudiation of those tenancies, because they rest on a statute, not on a "contract" or "lease" subject to repudiation under Section 1821(e)(1). Pet. App. 80a-87a.

4. The court of appeals reversed. Pet. App. 29a-65a. Based on a detailed consideration of applicable New York law (*id.* at 44a-53a), the court rejected petitioners' claims that those laws "creat[e] a statutory tenancy that is in effect non-contractual, and beyond the reach of RTC's repudiation power" (*id.* at 45a). The court concluded instead that

> New York's statutory tenancies—whether under rent stabilization or rent control—are contract-

---

[4] The record does not indicate that any of the tenants are persons of low or moderate income protected by the RTC's policy statement. Pet. App. 39a.

> based leaseholds. That being the case, they fall within the express language of § 1821(e), and are subject to RTC's statutory power to repudiate. By repudiating the contract or lease creating the tenancy, RTC is effectively dissolving the tenancy. Once it has done so, no statutory or regulatory provision—at least none that can pass constitutional muster—can revive that tenancy.

Id. at 52a. The court noted that its conclusion that Section 1821(e) allows the RTC to terminate tenancies that could be extended indefinitely by the tenant under state law was supported by the contrast between the absolute repudiation right granted in Section 1821(e) and the lease termination provision in the Bankruptcy Code, which expressly permits a tenant of a bankrupt landlord to renew or extend the lease whenever the tenant has a right to such a renewal or extension "that is enforceable by such lessee under applicable nonbankruptcy law." Pet. App. 53a-56a (discussing 11 U.S.C. 365(h)(1)).

The court then turned to petitioners' argument that the leasehold in a rent-controlled apartment is perpetual, and thus not subject to repudiation, because of the provisions of Section 1821(e)(5) that allow a tenant to remain in occupancy until the end of the term of its lease. Pet. App. 56a-59a. The court rejected that argument based on its conclusion that the lease term of a rent-controlled apartment ends at the end of the biennial period provided for review of rent under the rent-control laws. *Id.* at 58a-59a.

The court also rejected petitioners' argument that the RTC erred in determining that the tenancies were burdensome. Pet. App. 59a-60a. The court explained:

> It is uncontroverted that (a) these tenancies are causing RTC to lose close to $19,000 per month and (b) these occupied rent-regulated units are worth millions of dollars less than they are worth vacant or free of rent regulations. It cannot be said therefore that RTC abused its discretion in finding these tenancies burdensome.

Id. at 60a.

5. This Court vacated the judgment of the court of appeals and remanded the case for reconsideration in light of *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048 (1994). *Solomon* v. *RTC*, 115 S. Ct. 43 (1994); *Pattullo* v. *RTC*, 115 S. Ct. 44 (1994). On remand, the court of appeals reaffirmed its prior judgment and, with some clarifications and one modification, reinstated its original opinion. Pet. App. 1a-27a.

After analyzing this Court's opinion in *O'Melveny* (Pet. App. 6a-10a), the court of appeals observed (*id.* at 11a) that, while *O'Melveny* involved the propriety of judicial "creation of a federal rule of decision" (*ibid.*, quoting *O'Melveny*, 114 S. Ct. at 2056), this case involves only judicial interpretation of a federal statutory provision, Section 1821(e), which itself "specifically create[s] [a] special federal rule[] of decision" (Pet. App. 11a, quoting *O'Melveny*, 114 S. Ct. at 2054). This case therefore posed no question of "federal common law." Pet. App. 11a; see *id.* at 14a.

The court again rejected (Pet. App. 12a-19a) petitioners' argument that rent-regulated tenancies in New York are purely statutory, rather than contractual, and are therefore not subject to the RTC's statutory power to repudiate "any contract or lease." 12 U.S.C. 1821(e)(1) (Supp. V 1993). Recognizing (Pet. App. 12a) *O'Melveny*'s disapproval of the

judicial creation of new remedies or causes of action to supplement a comprehensive federal statutory scheme, the court pointed out (*id.* at 13a-14a) that in this case it had only "construed the language of a federal statute that by its own terms created a rule of decision" (*id.* at 14a).

The court rejected (Pet. App. 12a) petitioners' contention that, under *O'Melveny*, words or terms not expressly defined in such a federal statute must be construed solely in accordance with state law. Instead, the court looked to "generally applicable, longstanding principles of law" (*id.* at 14a), as well as to the particular characteristics of rent regulation in New York, in construing the meaning and application of the term "lease" in the federal statute. See *id.* at 14a-19a. On that basis, the court reaffirmed its prior determination that the tenancies at issue are fundamentally contractual, albeit heavily regulated by the State, and that the State's regulations "merely involve[] restrictions imposed on existing tenancies." *Id.* at 19a (quoting *Seawall Associates* v. *City of New York*, 544 N.Y.S.2d 542, 548 (N.Y.), cert. denied, 493 U.S. 976 (1989)). Because "the tenancy itself—the interest in the property—was created by [a] lease," the court concluded that Section 1821(e)(1) conferred on the RTC the right to terminate a regulated tenancy and all "the relationships and interests that the [lease] document creates." Pet. App. 19a.

The court also specifically addressed (Pet. App. 19a-23a) petitioners' argument that, even if the RTC could repudiate the lease underlying a regulated tenancy, the tenant's "statutory freedom from eviction" (*id.* at 19a-20a) would survive repudiation, so that the agency would be "bound by the rent regulations to accept the state-regulated rent in exchange

for the tenant's continued occupation of the property" (*id.* at 20a). The court recognized the deference due to a State's exercise of its traditional police powers, but concluded that, in this case, enforcement of the State's non-eviction rules would effectively negate the RTC's federal statutory power to repudiate the underlying tenancies, which it had determined to be "burdensome" (12 U.S.C. 1821(e)(1)(B) (Supp. V 1993)) precisely because of "the regulated rent and the diminished asset value that the rent-regulation causes." Pet. App. 22a-23a. Because that result would "directly interfere[] with the 'accomplishment and execution of the full purposes and objectives of Congress'" (*id.* at 22a (citation omitted)), the court held that Section 1821(e)(1) preempts enforcement of the State's non-eviction rules to the extent that such enforcement would "bar the RTC from taking steps necessary to fully effect a repudiation of the [underlying] tenancy" (Pet. App. 20a).[5]

---

[5] The court modified its previous decision with respect to the time allowed for rent-controlled tenants to remain on the premises under Section 1821(e)(5)(A)(ii). Pet. App. 23a-27a. The court's first decision held (*id.* at 56a-59a) that the "term" of the rent-controlled leasehold for those purposes was the biennial period provided under New York's rent-control laws for review of the rental rates. On remand, the court took note of recently enacted New York legislation providing for the deregulation of some rent-controlled apartments. Finding repudiation of the underlying tenancy closely analogous to statutory deregulation, the court modified its prior decision to conform to the new time period provided by state law for vacation of decontrolled premises. *Id.* at 26a-27a.

ARGUMENT

When this case was first before the Court, the Court remanded it for reconsideration in light of the intervening decision in *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048 (1994). After carefully reviewing *O'Melveny* and revisiting its previous analysis of the case, the court of appeals reaffirmed its initial conclusion that 12 U.S.C. 1821(e) (Supp. V 1993) authorizes the RTC to repudiate the rent-regulated tenancies at issue here. That decision, which is the first appellate decision to consider the question presented, is consistent with the governing federal statute and does not conflict with any decision of this Court or of any other court of appeals. This case therefore requires no further review.

1. Petitioners contend (94-1528 Pet. 21-29; 94-1564 Pet. 17-19) that the decision below conflicts with this Court's decision in *O'Melveny*. The court of appeals correctly focused (Pet. App. 11a), however, on the central distinction between this case and *O'Melveny*: *O'Melveny* involved judicial creation of a federal common law rule modifying the elements of a state law tort action brought by the RTC "in the shoes of" an insolvent thrift, whereas this case involves interpretation of a federal statutory provision that specifically authorizes the RTC to step *out* of those shoes in order to exercise an express right of federal receivership. See *O'Melveny*, 114 S. Ct. at 2054. *O'Melveny* explicitly recognized that its reading of FIRREA required application of state law "except where some provision in the extensive framework of FIRREA provides otherwise." *Ibid.* This case involves just such an "explicit federal statutory provision"—indeed, one cited by the *O'Melveny* Court itself as an example of FIRREA provisions that

"specifically create special federal rules of decision." *Ibid.* (citing 12 U.S.C. 1821(e)(1) and (3) (Supp. V 1993)).

Petitioners argue (94-1528 Pet. 25-27; 94-1564 Pet. 17-18) that *O'Melveny* requires that the phrase "contract or lease" in Section 1821(e)(1) be controlled solely by applicable state law. As the court of appeals recognized (Pet. App. 12a-14a), however, nothing in *O'Melveny* disturbed the well-settled proposition that the interpretation of the terms used in a federal statute is ultimately a matter of federal law. See, *e.g.*, *United States* v. *Idaho*, 113 S. Ct. 1893 (1993) (fees characterized by state law as "filing fees" rather than "costs" are nonetheless "costs" for purposes of 43 U.S.C. 666); *District of Columbia* v. *Greater Washington Board of Trade*, 113 S. Ct. 580 (1992) (whether particular state law "relates to" a plan protected by ERISA is a question of federal law, although dependent on the effect of the state law); *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992) (preemption of state rules relating to cigarette advertising is a question of federal law, dependent on the requirements of state regulations and causes of action); *United States* v. *National Bank of Commerce*, 472 U.S. 713, 727 (1985) ("The question whether a state-law right constitutes 'property' or 'rights to property' [under 26 U.S.C. 6331(a)] is a matter of federal law."); *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103, 111-112 (1983) ("Whether one has been 'convicted' within the language of the [federal] gun control statutes is necessarily * * * a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State."); *RFC* v. *Beaver County*, 328

U.S. 204, 208 (1946) (a State's definition of a term appearing in a federal statute cannot govern "if it conflicts with the scope of that term as used in the federal statute").

It is true that, as the decisions just cited indicate, the interpretation of terms in a federal statute is often properly informed by reference to particular state laws, or to general principles of state or common law. See also, *e.g.*, *BFP* v. *RTC*, 114 S. Ct. 1757, 1764 (1994) ("Federal statutes impinging upon important state interests cannot be construed without regard to the implications of our dual system of government." (internal quotation marks and ellipsis omitted)); see 94-1564 Pet. 20-21. The court of appeals respected that principle here. See, *e.g.*, Pet. App. 12a-19a & n.2; *id.* at 43a-52a ("consult[ing] for guidance the body of New York law concerning the design and operation of the rent regulation programs at issue" (*id.* at 43a) before concluding that rent-regulated tenancies are "ultimately based on a lease or other voluntary contractual arrangement" (*id.* at 44a)). Moreover, the court sought and found evidence of congressional intent that leasehold interests like those at issue should fall within the receiver's statutory repudiation power. See *id.* at 53a-56a. Nothing in the court's methods or result is inconsistent with this Court's decision in *O'Melveny*, or with sound principles of statutory interpretation.

Finally, petitioners contend (94-1528 Pet. 22-24; 94-1564 Pet. 18-19) that the court of appeals erroneously relied, in its preemption analysis (see Pet. App. 21a-22a), on a "more money" argument of the sort rejected in *O'Melveny*, 114 S. Ct. at 2055. *O'Melveny*, however, disapproved only the use of a

general interest in preservation of the deposit insurance fund to justify federal common-law modification of a state-law cause of action. *Ibid.* In this case, by contrast, the court of appeals relied on the specific purpose—enhancing the value of a failed institution's assets—underlying the specifically conferred federal power to terminate "burdensome" leases, in order to determine the proper preemptive scope of the federal power. Pet. App. 21a-22a. As the court of appeals recognized (*id.* at 24a n.4), nothing in *O'Melveny* proscribes that sensible approach.

2. Petitioners argue (94-1528 Pet. 13-16; 94-1564 Pet. 17-18) that the decision below conflicts with decisions of this Court recognizing a distinction between obligations imposed by state law and obligations imposed by contract. That is not correct.

a. *American Airlines, Inc.* v. *Wolens*, 115 S. Ct. 817 (1995), and *Cipollone* v. *Liggett Group, Inc.*, *supra*, concluded that two federal statutes that explicitly preempted state laws did not, at the same time, preempt private contractual obligations.[6] *General Motors Corp.* v. *Romein*, 503 U.S. 181 (1992), held that state employee benefit laws were not automatically incorporated into private employment agreements in such a way that later, retroactive changes in the benefit laws would violate the Contract Clause of the Constitution. Petitioners cite these cases for the general proposition that state laws and private contracts must be distinguished for purposes of analysis.

---

[6] Conversely, but to the same effect, the appellate cases applying *Cipollone* cited by petitioners in No. 94-1528 (at 18-19) hold that explicit federal preemption provisions do preempt enforcement of warranties implied under state law (rather than created solely by private agreement).

The court of appeals in this case concluded that the underlying contract between rent-regulated tenants and their landlords remained a "lease," subject to repudiation under Section 1821(e)(1), despite the effects of supervening state laws that limited or modified the lease terms. See, *e.g.*, Pet. App. 11a. That issue has nothing to do with preemption, or with the Contract Clause. On remand, the court did consider separately whether the same state laws that had regulated the repudiated leases could apply, after the repudiation, directly to the RTC as owner of the properties in question. *Id.* at 19a-23a. The court concluded that, under the circumstances of this case, those non-contractual state law restrictions were preempted by federal law to the extent necessary to effectuate the repudiation. *Id.* at 23a. Nothing in that two-step analysis—repudiation of the contract, followed by a limited preemption of related state law—in any way "obliterates" (94-1528 Pet. 13) the distinction between private contract and state law.

b. Similarly, petitioners claim (94-1528 Pet. 16-17; 94-1564 Pet. 16-17) that the court of appeals' decision conflicts with decisions construing the term "agreement" as used in a different provision of FIRREA, 12 U.S.C. 1823(e) (Supp. V 1993). Those decisions held only that obligations created by state law, independent of any private agreement, are binding on a federal receiver despite Section 1823(e)'s prohibition against the enforcement of certain private "agreement[s]" that are not adequately reflected in the records of the insolvent institution. See, *e.g.*, *Bateman* v. *FDIC*, 970 F.2d 924, 927-929 (1st Cir. 1992) (mechanic's lien created without agreement); *Patterson* v. *FDIC*, 918 F.2d 540, 543-545 (5th Cir. 1990) (state constitutional homestead interest). The

court in this case, however, held that the agreement that underlies a landlord-tenant relationship remains a "lease," even if state law later modifies the contractual rights of the parties; and that the specific federal authorization to repudiate such a lease preempts application of state laws designed to regulate the original agreement, to the extent necessary to effectuate the repudiation. The cases on which petitioners rely thus deal with a different issue from that involved here.

c. Petitioners argue (94-1528 Pet. 17-18; 94-1564 Pet. 15) that the decision below conflicts with decisions interpreting the words "contract" and "lease" as used in 11 U.S.C. 365(a). As we stated in our opposition to petitioners' previous petitions (93-1748 & 93-1757 Br. in Opp. 13-14), those cases did not consider whether a trustee or receiver had the power to reject a lease burdened by state regulations, but rather the separate question whether tenancies that continued after rejection of a lease in bankruptcy were exempt from state laws imposing obligations on landlords.

Nothing in the decision in this case permits the RTC to ignore generally applicable regulations affecting the property it owns (such as the housing code provisions at issue in *Saravia* v. *1736 18th St., N.W., Limited Partnership*, 844 F.2d 823 (D.C. Cir. 1988)), and a rent-regulated tenant (as well as the property's neighbors and the general public) will retain the protection of such regulations so long as the tenant remains in possession of the leased premises—either before repudiation, or after repudiation but during the remaining term of the lease (as computed for purposes of Section 1821(e)(5)). The court of appeals held only (Pet. App. 23a) that Section

1821(e) allows repudiation of the underlying regulated lease, and preempts the *anti-eviction* provisions of state law to the extent necessary to effectuate that repudiation after the expiration of the period of continued occupancy permitted under Section 1821 (e)(5).

For the same reason, petitioners are incorrect in asserting (94-1528 Pet. 3, 12) that the decision below has a "breathtaking scope" and would preempt "essential 'services' obligations imposed by state and local housing codes" and implied warranties of habitability. The court of appeals referred to implied warranties, for instance, by way of demonstrating that even concededly contractual tenancies are subject to a range of state regulations. See Pet. App. 45a. The court never "acknowledged" (94-1528 Pet. 12), or even suggested, that the RTC's repudiation power, or the preemptive force of Section 1821(e), would allow the RTC to avoid the state-law obligations common to any landlord, so long as the tenant's possession of the leased premises remains valid under federal law.[7]

---

[7] Petitioners exaggerate the "practical importance" of this case. See 94-1528 Pet. 30; see also *id.* at 11-12. The RTC, as receiver, owns a limited (and diminishing) number of rent-regulated properties. As a matter of policy, the agency does not repudiate leases held by low- or moderate-income individuals or families. See pages 3-4, *supra*. As a practical matter, the agency also does not repudiate leases where controlled rents are at or near market levels. The regulated tenancies in this case depressed the market value of the nine apartments in question from $7.5 million to $1.5 million, and required a cash subsidy from the RTC—and thus, ultimately, from the taxpayer—of nearly $19,000 *per month*. Finally, again as a matter of policy, tenants in possession under

3. Petitioners argue (94-1528 Pet. 27-29; 94-1564 Pet. 14-15) that, under New York law, rent-regulated tenancies are clearly "statutory," rather than in any way contractual. The New York cases on which the court of appeals relied, however, demonstrate that the State's rent regulations have not divorced regulated tenancies entirely from their contractual basis.[8] Petitioners cite one recent decision, for example, for the proposition that "rent-controlled tenants maintain their apartments not by contract but by operation of

---

repudiated leases are typically offered the opportunity to purchase their apartments (as were the tenants in this case). C.A. App. A93, A104. There is accordingly no reason to think that the court of appeals' decision will result in "the eviction of thousands of families from their homes." 94-1528 Pet. 30.

[8] See, *e.g.*, *Seawall Associates* v. *City of New York*, 544 N.Y.S.2d 542, 548 (N.Y.) ("The rent-control and other landlord-tenant regulations that have been upheld * * * merely involved restrictions imposed on existing tenancies where the landlords had voluntarily put their properties to use for residential housing."), cert. denied, 493 U.S. 976 (1989); *Rent Stabilization Ass'n* v. *Higgins*, 608 N.Y.S.2d 930, 936-938 (N.Y. 1993) (rent regulations are not "takings" because they rest on the owner's voluntary acquiescence in the use of property for rental housing), cert. denied, 114 S. Ct. 2693 (1994); *Dawson* v. *Higgins*, 610 N.Y.S.2d 200, 206 (App. Div.) (rent-control provisions "plainly do not require a landlord to remain in the rental market in perpetuity"), appeal dismissed, 616 N.Y.S.2d 476 (N.Y. 1994), cert. denied, 115 S. Ct. 724 (1995); cf. *Manocherian* v. *Lenox Hill Hosp.*, 618 N.Y.S.2d 857 (N.Y. 1994) (striking down particular rent stabilization law as an unconstitutional taking), cert. denied, Nos. 94-1555 and 94-1560 (May 15, 1995).

law." 94-1564 Pet. 14 (citing *Duell* v. *Condon*, 622 N.Y.S.2d 891, 893 (N.Y. 1995)). Petitioners fail to point out, however, that the very next sentence of the *Duell* opinion states that, "[i]n contrast, * * * the nature of the rent-*stabilized* landlord/tenant relationship *continues to be contractual in nature*." *Duell*, 622 N.Y.S.2d at 893 (emphasis added). Moreover, the decision immediately goes on to hold that an attorneys' fees clause contained in a 1960 lease "carried forward into the statutory [rent-*controlled*] tenancy" at issue in that case, despite the nominal expiration of the lease, so that it could still be enforced (against the original landlord's executors) in 1995. *Ibid.* That holding hardly demonstrates a complete statutory displacement of the original contractual basis for the tenancy.

The question whether rent-regulated tenancies are completely "statutory," or remain partly "contractual," is a complex one. The court of appeals thoroughly considered that question (see, *e.g.*, Pet. App. 16a-19a, 44a-53a), and twice concluded that such tenancies, "albeit 'statutory tenancies' according to state law," are nonetheless "rooted in lease or contract," and are therefore "subject to the RTC's repudiation power" as a matter of federal law. *Id.* at 5a; see *id.* at 15a, 19a, 52a. There is no reason for this Court to reconsider the interpretation of New York law that informs the Second Circuit's conclusion. See, *e.g.*, *O'Melveny*, 114 S. Ct. at 2056 (Stevens, J., concurring) (local federal judges are in the best position to determine questions of local law). Nor, in the absence of any conflict among the circuit courts, is there any reason for review by this Court of

the court of appeals' interpretation of the governing federal statute.[9]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

ELLEN B. KULKA
General Counsel

ANDREW E. TOMBACK
Deputy General Counsel

KEVYN D. ORR
Assistant General Counsel
Resolution Trust Corporation

JUNE 1995

---

[9] For much the same reasons, there is no reason for this Court to review petitioners' claim (94-1528 Pet. 29 & n.17; 94-1564 Pet. 19) that the court of appeals "misapplied the FIRREA provision which gives tenants the right to remain in their apartments for the full term of their leasehold" by refusing to hold that rent-controlled tenancies, which have no specific lease "term," should therefore be perpetual, even after repudiation, under Section 1821(e)(5). The court of appeals gave careful attention to state law in selecting a period for the expiration of a tenant's continued occupancy rights under that Section, and in modifying its decision on that point on remand in order to take account of new developments in state law. See Pet. App. 23a-27a, 56a-59a. That approach appropriately accommodates the State's interests, while still respecting the supervening commands of federal law. See *id.* at 23a (*"O'Melveny* counsels that, where Congress has not provided a specific rule of decision, the courts should look to state law to fill in the[] interstices.").

☆ U. S. GOVERNMENT PRINTING OFFICE: 1995 387147 20086